

March 21, 2017

Public Input
U.S. Equal Employment Opportunity Commission
Executive Officer
131 M St., N.E.
Washington, D.C. 20507

Via online submission

Re: Proposed Enforcement Guidance on Unlawful Harassment, EEOC-2016-0009-0001

Thank you for the opportunity to provide comments on the U.S. Equal Employment Opportunity Commission's ("EEOC" or "the Commission") Proposed Enforcement Guidance on Unlawful Harassment ("Proposed Enforcement Guidance"). The National Women's Law Center has worked for 45 years to advance and protect women's equality and opportunity, and has long worked to remove barriers to equal treatment of women in the workplace. Protecting against workplace harassment, including sex-based harassment, is key to achieving this equal treatment. We write to express our strong support for the Proposed Enforcement Guidance and believe it will promote the reduction of sex-based discrimination and harassment in the workforce. The EEOC last issued policy guidance on harassment in 1999; since then, the law has evolved significantly. One-third of all EEOC charges include an allegation of harassment,¹ demonstrating the need for current and robust guidance for employers and EEOC investigators. We write to offer suggestions for further clarifying and strengthening the Proposed Enforcement Guidance.

I. Sex-Based Harassment, Including Sexual Harassment, Remains a Serious and Pervasive Barrier to Equality, Economic Security and Workplace Safety.

While more than 72 million women are in the labor force in the United States, representing nearly half the country's workforce,² sexual harassment undermines their best efforts to provide for themselves and their families. One in four women reports that she has experienced sexual harassment at work.³ In Federal Fiscal Year 2016, nearly 30,000 harassment charges were filed with the EEOC;⁴ nearly one-quarter of those charges alleged sexual harassment.⁵

¹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT AND LITIGATION STATISTICS, ALL CHARGES ALLEGING HARASSMENT FY 2010-FY 2016, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

² U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, Table 3, available at <https://www.bls.gov/cps/cpsaat03.pdf>.

³ LANGER RESEARCH, ABC NEWS & WASHINGTON POST, *One in Four U.S. Women Reports Workplace Harassment* (Nov. 16, 2011), available at <http://www.langerresearch.com/uploads/1130a2WorkplaceHarassment.pdf>.

⁴ EEOC, ENFORCEMENT AND LITIGATION STATISTICS, ALL CHARGES ALLEGING HARASSMENT FY2010-FY 2016, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm

But these charge statistics do not even begin to represent the extent of sexual harassment in the workplace, given that a survey found that 70 percent of workers who experience sexual harassment say they have never reported it.⁶ Whether suffering harassment from supervisors, coworkers, or third parties, such as customers, most victims of harassment are suffering in silence.

Sexual harassment is particularly common for women in low-wage jobs and in nontraditional fields. For example, women working in the restaurant industry, particularly women who rely on tips to supplement a sub-minimum wage, are among the lowest-paid workers, and -- relatedly--experience sexual harassment at high rates.⁷ Sixty percent of female and transgender restaurant workers report that sexual harassment is an uncomfortable aspect of work life,⁸ over half of whom describe sexual harassment as occurring on at least a weekly basis.⁹ This harassment is perpetrated by management (according to 66 percent of restaurant workers), coworkers (according to 80 percent of restaurant workers), and customers (according to 78 percent of restaurant workers).¹⁰ Sexual harassment is also a serious problem for women working in the agricultural industry, with conduct ranging from unwanted touching and remarks to sexual assault and rape in the fields, where harassers -- frequently their supervisors -- are often able to perpetrate their crimes in private.¹¹ Women who work as hotel employees report facing sexual harassment from coworkers,¹² supervisors,¹³ and hotel

⁵ EEOC, ENFORCEMENT AND LITIGATION STATISTICS, CHARGES ALLEGING SEXUAL HARASSMENT FY2010-FY 2016, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

⁶ HUFFINGTON POST & YOUNG, *Poll of 1,000 Adults in United States on Workplace Sexual Harassment* (Aug. 2013), available at http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf.

⁷ Women constitute 66 percent of the occupations that receive a sub-minimum wage of \$2.13 per hour that must be supplemented with tips—wages that leave many women working and living in poverty. REST. OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, *THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 5* (2014), available at http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.

⁸ *Id.* at 2.

⁹ *Id.* at 6.

¹⁰ *Id.* at 2.

¹¹ HUMAN RIGHTS WATCH, *CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT* (May 2012), available at <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual> (documenting pervasive sexual harassment and violence among immigrant farmworker women); Waugh, I.M., *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 *VIOLENCE AGAINST WOMEN* 237, 241 (Jan. 2010), available at <http://vaw.sagepub.com/content/16/3/237.abstract> (eighty percent of female farmworkers in California's Central Valley reported experiencing some form of sexual harassment).

¹² *See, e.g.*, *Gasper v. Ruffin Hotel Corp. of Maryland*, 183 Md. App. 211, 216, (2008) *aff'd*, 418 Md. 594, 17 A.3d 676 (2011) (in which an employee of Ruffin Hotel Corporation sued the company because she alleged that the company retaliated against her by terminating her employment due to her reports of sexual harassment from other employees); *Arthur v. Pierre Ltd.*, 2004 MT 303, 323 (in which a hotel dining room waitress was sexually harassed by coworker (a night auditor) and alleged that management ignored her multiple reports of sexual harassment).

¹³ *See, e.g.*, *Ramada Inn Surfside v. Swanson*, 560 So. 2d 300, 301 (Fla. Dist. Ct. App. 1990) (lounge supervisor of hotel sued for workers' compensation benefits for emotional injuries after she was sexually harassed by her supervisor, including unwanted sexual contacts).

With the law on your side, great things are possible.

guests.¹⁴ Yet out of fear of losing their jobs and the income that is critical to their families, few women in low-wage jobs report the sexual harassment they face at work, but rather tolerate it as part of the culture of the workplace, or the cost of maintaining employment.¹⁵

Women in better-paying jobs that are nontraditional for women also face high rates of sexual harassment. For instance, while construction and extraction jobs typically offer women the opportunity to earn higher wages than in traditionally female occupations,¹⁶ data indicate that most of the women in these industries face extreme sexual harassment and denigration.¹⁷ A study by Chicago Women in Trades found that 88 percent of female construction workers experience sexual harassment at work,¹⁸ more than three times the rate of women in the general workforce.¹⁹ The harassment women may face intensifies the already high risks of physical injury, leaving some women afraid for their lives.²⁰ Women account for less than four percent of firefighters,²¹ and they face high rates of discrimination.²² When these

¹⁴ UNITE HERE LOCAL 1, HANDS OFF, PANTS ON: SEXUAL HARASSMENT IN CHICAGO'S HOSPITALITY INDUSTRY (July 2016), available at <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf> (58 percent of

hotel workers and 77 percent of casino workers surveyed reported being sexually harassed by a guest); *Chafoulias v. Peterson*, 668 N.W.2d 642, 645 (Minn. 2003) (five female Radisson hotel employees - who eventually quit - alleged management ignored their reports of sexual harassment by male guests, in that they set up a meeting to discuss the problem, which the company then canceled).

¹⁵ See THE GLASS FLOOR, *supra* note 7, at 27 (70 percent of restaurant workers surveyed felt there would be negative repercussions, such as lower tips, if they complained about customer harassment); HANDS OFF, PANTS ON, *supra* note 14, at 8 (hospitality workers surveyed said they chose not to report customer harassment "because inappropriate guest behavior is so frequent and widespread, it 'feels normal' or they had become 'immune' to it"). In a nationwide survey of workers in the fast food industry, nearly 40 percent of the women reported experiencing unwanted sexual behaviors on the job. Of those workers, 21 percent reported that they suffered negative workplace consequences after raising the harassment with their employer. Hart Research Assoc., *Key Findings From a Survey of Women Fast Food Workers* (Oct. 5, 2016), available at <http://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf>.

¹⁶ NAT'L WOMEN'S LAW CTR., WOMEN IN CONSTRUCTION: STILL BREAKING GROUND (2014), available at http://nwlc.org/wp-content/uploads/2015/08/final_nwlc_womeninconstruction_report.pdf.

¹⁷ MATHEMATICA POLICY RESEARCH, AN EFFECTIVENESS ASSESSMENT AND COST-BENEFIT ANALYSIS OF REGISTERED APPRENTICESHIP IN 10 STATES 50-52 (2012), available at http://wdr.doleta.gov/research/FullText_Documents/ETAOP_2012_10.pdf; Elizabeth J. Bader, *Skilled Women Break Through Barriers to Entry and Promotion in Trades Work*, TRUTH-OUT.ORG (October 6, 2012), available at <http://www.truth-out.org/news/item/11927-skilled-women-break-through-barriers-to-entry-and-promotion-in-trades-work>.

¹⁸ CHICAGO WOMEN IN TRADES, BREAKING NEW GROUND: WORKSITE 2000 (1992), available at <http://chicagowomenintrades2.org/wp-content/uploads/2015/02/Breaking-New-Ground2.pdf>; ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE SAFETY AND HEALTH PROTECTION (1999), available at <https://www.osha.gov/doc/accsh/haswicformal.html>

¹⁹ See ABC NEWS & WASHINGTON POST, *supra* note 3.

²⁰ ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, *supra* note 18 (describing a female construction worker who had hammers and wrenches dropped on her from the scaffolding above by her male coworkers, and describing a female miner who reported that a male coworker threatened to throw her - or, as he called her, "the little bitch" - into concentrator bins, the likely result of which would have been death by suffocation or crushing").

²¹ Women account for only 3.7 percent of firefighters. Hulett, D., *et al.*, *A National Report Card on Women in Firefighting* 1 (Apr. 2008), available at <https://www.i-women.org/wp-content/uploads/2014/07/35827WSP.pdf>.

With the law on your side, great things are possible.

workers report harassment, they are met with apathy or retaliation.²³ Likewise, women in law enforcement account for only 11.3 percent of sworn officers, 12.9 percent of sheriffs, and 16.1 percent of federal officers.²⁴ They experience high rates of gender-based harassment at the hands of fellow officers,²⁵ and like other women in male-dominated fields, face various forms of retaliation for complaining about harassment, including those that compromise their safety.²⁶

These are only a few examples of the many ways in which sexual harassment continues to compromise women's economic security and safety, demonstrating the ongoing need for the Commission's robust enforcement efforts, including through strong and clear guidance.

II. The Final Guidance Should Clarify the Scope of the Term “Hostile Work Environment” Harassment.

As an initial matter, we urge the Commission to clarify its use of the term “hostile work environment,” which is employed inconsistently throughout the Proposed Enforcement Guidance. The Proposed Enforcement Guidance indicates -- reasonably given Supreme Court precedent -- that the Commission questions the continued utility and relevance of the distinction between quid pro quo and hostile work environment theory, and instead suggests evaluating employer liability based on whether or not the conduct culminated in a tangible employment action.²⁷ Thus, in Sections I.B. and II of the Proposed Enforcement Guidance, for example, the Commission appears to use the term “hostile work environment” to refer collectively to all harassment claims.²⁸ Likewise, the subsequent discussion in Section IV of employer liability for harassment uses only the term “hostile work environment harassment.”²⁹ Given the history of “hostile work environment” being used to describe a form of harassment distinct from “quid pro quo” harassment, however, it would be helpful if the Final Guidance early on made explicit (in the text, rather than a footnote) that it uses the term “hostile work environment” to describe all forms of actionable harassment, to avoid confusion or any suggestion that the discussions using that phrase describe only a subset of harassment claims.

²² More than 84 percent of women firefighters report experiencing gender discrimination in some form, including sexual harassment. *Id.* at 3.

²³ *Women in Firefighting*, *supra* note 21, at 8-9 (65.0 percent of women reported that their department has no procedures of which they were aware for addressing such complaints, and 23.4 percent reported that their supervisors fail to address problems reported to them).

²⁴ Diane Wetendorf, *Female Officers as Victims of Police-Perpetrated Domestic Violence* 1 (Apr. 2007), available at http://www.dwetendorf.com/Wetendorf_FemaleOfficer.pdf.

²⁵ NAT'L CTR. FOR WOMEN & POLICING, RECRUITING & RETAINING WOMEN: A SELF-ASSESSMENT GUIDE FOR LAW ENFORCEMENT 133 (2000), available at <https://www.ncjrs.gov/pdffiles1/bja/185235.pdf> (“[A]nywhere from 60-70 percent of women officers experienced sexual/gender harassment.”).

²⁶ *Id.* at 141.

²⁷ Proposed Enforcement Guidance, nn.53 & 140.

²⁸ See Proposed Enforcement Guidance, §I.B, Structure of This Guidance (“In explaining how to evaluate whether harassment violates federal EEO law, this enforcement guidance focuses on three components of a hostile work environment claim”); §II, Covered Bases and Causation (“The EEO laws prohibit harassment that creates a hostile work environment if it is based on one or more of the characteristics protected by these laws”).

²⁹ Proposed Enforcement Guidance, §IV.

With the law on your side, great things are possible.

This clarification would be particularly helpful given that the discussion in Section III.A of the Proposed Enforcement Guidance describes at least two types of harassment claims—seemingly “quid pro quo” and “hostile work environment” harassment by other names: the Section distinguishes harassment that results in an “explicit change” to the terms or conditions of employment from harassment that does not result in an “explicit change” but is severe or pervasive enough to alter the conditions of employment.³⁰ The latter claim seems intended to describe hostile work environment, but the first claim does not entirely accommodate quid pro quo sexual harassment, in which a person’s submission to or rejection of sexual advances is used as the basis for employment decisions about him or her, or submission to sexual advances is made a condition of his or her employment. This framework creates some difficulty and confusion, given the previous use of “hostile work environment” to apparently cover all forms of unlawful harassment.

Furthermore, the discussion in Section III.A regarding harassment that results in an “explicit change” to the terms and conditions of employment suggests that an employee could only establish a cognizable claim when the submission to or rejection of sexual advances is used as the basis for employment decisions about him or her *if* he or she is able to show the employer *expressly* stated that the refusal of sexual advances was the basis for the change to the terms and condition of employment—a misstatement of the law. If a supervisor fired an employee the day after she refused his sexual advances because of her refusal, this would be a violation of the law, whether or not the supervisor explicitly stated his reason for terminating her. We urge the Commission to set out clearly that an employee can establish harassment by showing that submission to such conduct is made either explicitly or implicitly a term or condition of employment.

III. The Proposed Enforcement Guidance Correctly Identifies Multiple Forms of Sex-Based Harassment and Should Provide Additional Examples.

We commend the Proposed Enforcement Guidance’s recognition that sex-based harassment should be broadly interpreted to include non-sexual conduct that is based on the targeted employee’s gender; harassment “based on an individual’s non-conformance with social or cultural expectations of how men and women usually act,” including gender-stereotyped assumptions about family responsibilities; harassment based on gender identity; harassment based on sexual orientation; and harassment “based on pregnancy, childbirth, or related medical conditions, including lactation.”³¹ We urge the Commission further to ensure that the Final Guidance explicitly recognizes that sex-based harassment includes harassment based on other reproductive health decisions, including the decision to use contraception, have an abortion, or use infertility treatment to become pregnant, consistent with the Commission’s Enforcement Guidance on Pregnancy Discrimination.³²

³⁰ Proposed Enforcement Guidance, §III.A (“Thus, harassment based on a protected characteristic is actionable when the employee is subjected to discriminatory intimidation, ridicule, and insult that is severe or pervasive enough to create an objectively and subjectively hostile work environment”) (internal citations omitted).

³¹ Proposed Enforcement Guidance, §II.A.

³² EEOC, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES §§ I.A.3 & 4, I.B.1.a (June 25, 2015), available at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

With the law on your side, great things are possible.

A. *The Proposed Enforcement Guidance Appropriately Broadens Sex-Based Harassment to Include Harassment Based on Gender Stereotypes and Nonconformance with Gender Norms, Gender Identity and Sexual Orientation.*

We commend the Proposed Enforcement Guidance for explicitly recognizing that sex-based harassment includes harassment based on gender-stereotyped assumptions about family responsibilities. The language in the Proposed Enforcement Guidance is consistent with the EEOC's recognition in its Enforcement Guidance on caregiving that employers may be liable under Title VII for harassment directed at caregivers based on sex stereotypes about mothers.³³ Sex stereotypes about caregiving and family responsibilities undermine women's workplace success, as the Commission has previously recognized.³⁴ For example, among full-time, year-round workers, mothers typically earn only 70 percent of what fathers earn, and research shows that motherhood is often perceived by employers as rendering a worker less committed and less valuable, while fatherhood has the opposite effect. Women applicants or employees may also find themselves facing derogatory comments about the reliability of working mothers, less favorable training opportunities, less responsibility in assignments, or less favorable scheduling based on stereotypes about their competence and commitment given their caregiving responsibilities outside of work. For example, applicants or employees with parental responsibilities may be penalized for taking time to fulfill caregiving duties while other applicants or participants are not similarly penalized for taking time off for activities that are not related to caregiving responsibilities, such as attending a court date. The Proposed Enforcement Guidance could be further strengthened by the inclusion of illustrative examples of unlawful sex stereotyping based on caregiving responsibilities.

Additionally, we support the Proposed Enforcement Guidance's explicit recognition that sex-based harassment includes harassment based on an individual's gender identity and sexual orientation, including non-sexual conduct. Transgender and gender-nonconforming workers experience some of the highest rates of harassment at work across occupations. A study by the National Center for Transgender Equality found that fully 90 percent of transgender workers have encountered some form of harassment or mistreatment at work, and nearly half of transgender workers have experienced an adverse job outcome simply because of who they are.³⁵ Of those workers, more than a quarter report that they lost their jobs directly due to their gender identity or expression.³⁶ Lesbian, gay, and bisexual individuals also experience alarmingly high rates of discrimination at work due to their sexual orientation. An aggregation of a number of studies found that found that 16 to 68 percent of lesbian, gay or bisexual respondents reported experiencing employment discrimination, and seven to 41 percent of lesbian, gay or bisexual workers were verbally/physically abused or had their workplace

³³ EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, §§II.A.3 & II.F (May 23, 2007), available at <https://www.eeoc.gov/policy/docs/caregiving.html>.

³⁴ *Id.*

³⁵ GRANT, J., MOTET, L. & TANIS, J., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 51 (2011), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

³⁶ *Id.* at 53.

With the law on your side, great things are possible.

vandalized as a result of their sexual orientation.³⁷ The Proposed Enforcement Guidance appropriately addresses this harassment.

B. The Final Guidance Must Clarify That Harassment on the Basis of Pregnancy, Childbirth, or Other Related Conditions Includes Other Reproductive Health Decisions.

For nearly four decades, the Pregnancy Discrimination Act has made clear that Title VII’s prohibition on the basis of sex discrimination includes discrimination on the basis of “pregnancy, childbirth, or related medical conditions.”³⁸ Case law³⁹ and the Commission’s Enforcement Guidance on Pregnancy Discrimination recognize that these protections necessarily include protections for other reproductive health decisions, including discrimination based on a woman’s decision to:

- have an abortion (“Title VII protects women from being fired for having an abortion or contemplating having an abortion.”);⁴⁰
- use contraceptives (“Contraception is a means by which a woman can control her capacity to become pregnant, and, therefore, Title VII’s prohibition on discrimination based on potential pregnancy necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”);⁴¹ or
- use infertility treatment to become pregnant (“Employment decisions related to infertility treatments implicate Title VII... because surgical impregnation is intrinsically tied to a woman’s childbearing capacity, an inference of unlawful sex discrimination may be raised, if, for example, an employee is penalized for taking time off from work to undergo such a procedure.”).⁴²

Despite this clear guidance, women continue to be threatened or punished at work for their reproductive health decisions, underscoring the threat of harassment.⁴³ For example, in

³⁷ Badgett, M.V.L., *et al.*, THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf>

³⁸ *See, e.g.*, 42 U.S.C. § 2000e(k) (2012).

³⁹ *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983); *Int’l Union, UAW v. Johnson Controls*, 499 U.S. 187, 199, 211 (1991); *Hall v. Nalco*, 534 F.3d 644, 648 (7th Cir. 2008); *Turic v. Holland Hospitality Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996); *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008), *other grounds of order clarified by* 543 F.3d 178 (3d Cir. 2008); *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1016-17, *rev’d*, No. 03-0421-CV-W-HFS, 2007 WL 3071825 (W.D. Mo. Oct. 22, 2007); *Cooley v. Daimler-Chrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) (no longer good law after *In re Union Pac.*, 479 F.3d 936); *Mauldin v. Wal-Mart Stores, Inc.*, No. 01-2755, 2002 WL 20022334 (N.D. Ga. Aug. 23, 2002); *Erickson v. Bartell Drug. Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1397 (N.D. Ill. 1994).

⁴⁰ ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION, *supra* note 32, §I.A.4.c.

⁴¹ *Id.*, §I.A.3.d.

⁴² *Id.*, §I.A.3.c.

⁴³ Across the country, women have been threatened, punished, or fired for their reproductive health decisions. For examples, *see* NAT’L WOMEN’S LAW CTR., STATES TAKE ACTION TO STOP BOSSES’ RELIGIOUS BELIEFS FROM

With the law on your side, great things are possible.

Wisconsin, an employer threatened to fire employees if they accessed birth control through their employee health plan.⁴⁴ It is necessary, therefore, to make explicit that sex-based harassment includes harassment on the basis of reproductive health decisions.

Moreover, recognizing that sex-based harassment includes harassment on the basis of reproductive health decisions is consistent with the Commission's recognition that sex-based harassment includes harassment on the basis of sex or gender stereotyping. Just as sex stereotypes inform assumptions about family responsibilities, these stereotypes inform expectations and norms about whether, when, and how women have children, which can lead to discrimination or harassment. For example, a woman who uses birth control or has an abortion may face harassment because of gendered expectations that women should be mothers; an unmarried woman who becomes pregnant may face discrimination or harassment based on the gendered expectation that women should not have sex before marriage.

Consistent with Title VII's protections and the Commission's recognition that sex-based harassment includes harassment on the basis of sex stereotypes, we urge the Commission to explicitly affirm that harassment on the basis of "pregnancy, childbirth, and related medical conditions" includes harassment on the basis of reproductive health decisions, including the decision to become pregnant, have an abortion, use contraception, or use infertility treatment to start a family, whether married or unmarried.

IV. The Final Guidance Should Clarify the Appropriate Liability Standard for Employees With Supervisory Responsibilities.

The question of whether an employee is a supervisor is critical to determining the appropriate standard for employer liability for harassment. The Proposed Enforcement Guidance defines supervisor as a person with the power to take tangible employment actions against employees, consistent with the Supreme Court's decision in *Vance v. Ball State University*;⁴⁵ "nonsupervisory employees/coworkers" are defined as "other employees without the authority to take tangible employment actions,"⁴⁶ and employers can be held accountable for negligence of such employees. But the Proposed Enforcement Guidance would be strengthened by more clearly addressing how the negligence standard should be applied in determining employer liability for harassment by nonsupervisory employees who nevertheless wield a substantial amount of authority over their subordinates. There is a significant practical difference between lower-level supervisors who may not have the authority to take tangible employment actions but direct the daily activities of employees, and mere coworkers. Supervisors with the authority to direct daily work activities wield a significant amount of power that they can use to wreak havoc in the lives of their subordinates, particularly in

TRUMPING WOMEN'S REPRODUCTIVE HEALTH CARE DECISIONS (Nov. 2016), *available at* <http://nwlc.org/resources/states-take-action-stop-bosses%E2%80%99-religious-beliefs-trumping-women%E2%80%99s-reproductive-health-care-decisions/>.

⁴⁴ Doug Erickson, "Wisconsin Diocese Offers Birth Control Insurance, but Warns Employees Not to Use It," WFCOURIER.COM (Aug. 10, 2010), http://wfcourier.com/news/local/wisconsin-diocese-offers-birth-control-insurance-but-warns-employees-not/article_0b904262-a4e4-11df-bde9-001cc4c002e0.html.

⁴⁵ Proposed Enforcement Guidance, §IV.A; 133 S.Ct. 2434 (2013).

⁴⁶ Proposed Enforcement Guidance, §IV.A & B.

With the law on your side, great things are possible.

sectors with low-wage jobs and hourly or shift work.⁴⁷ In such industries, lower-level supervisors can harass or retaliate against an employee by reducing hours, denying breaks, or assigning a worker to an undesirable shift.⁴⁸

As the Proposed Enforcement Guidance appropriately notes, even with regard to supervisors who do not have the authority to take tangible employment actions against those they supervise, an employer has a heightened responsibility to protect employees against harassment when it has provided a supervising employee with authority over others.⁴⁹ In order to guard against overly broad interpretations of *Vance*, and because the *Vance* decision has encouraged employers to concentrate the power to hire and fire in the hands of a few, while still delegating significant day-to-day authority to lower-level supervisors in an effort to avoid vicarious liability for supervisor harassment, it is important for the Commission's Final Guidance to make explicit that for non-*Vance* supervisors the supervisory authority wielded by an employee is a factor that must be considered in determining whether an employer has been negligent in permitting harassment to occur. In light of courts' inconsistent determinations of who is a supervisor under the *Vance* standard, the Proposed Enforcement Guidance could be strengthened to include a more detailed discussion clarifying the determination of supervisor status and the appropriate liability standard, complete with examples of harassment by employees with various types and degrees of actual or effectively delegated authority.

V. The Proposed Enforcement Guidance's Discussion of Harassment by Non-Employees Should Be Strengthened.

The Proposed Enforcement Guidance's discussion of employer liability for harassment affirms in a cursory manner that employees are protected against unlawful harassment by non-employees such as independent contractors, customers, hospital patients, nursing home residents, and client employees.⁵⁰ Yet there is a conspicuous lack of detailed discussion of this issue, or indeed any examples of harassment by non-employees, in the Proposed Enforcement Guidance. Given that customer and client harassment of low-wage workers -- particularly in service industries -- is a widespread and persistent problem, we urge the EEOC to provide in the Final Guidance further discussion and examples illustrative of the manner in which such harassment manifests. We also urge the Commission to include in the Final Guidance explicit recognition of employer liability for student harassment of teachers under Title VII. Clarity on what constitutes employer negligence in these contexts also would help workers better understand their rights, and remind employers of their continued responsibility to address and prevent harassment by non-employees.

⁴⁷ See NAT'L WOMEN'S LAW CTR., REALITY CHECK: SEVENTEEN MILLION REASONS LOW-WAGE WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT (2014), available at https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_vancereport2014.pdf

⁴⁸ See *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2456 (Ginsburg, J., dissenting) ("An employee who confronts her harassing supervisor risks, for example, receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or with placement on a shift spanning hours disruptive of her family life").

⁴⁹ Proposed Enforcement Guidance, §IV.A.2.

⁵⁰ Proposed Enforcement Guidance, §V.A.3.

With the law on your side, great things are possible.

A. *Customer Harassment of Workers is a Widespread and Persistent Problem in Low-Wage Jobs.*

As discussed above, workplace sex-based harassment is a widespread problem, particularly for women in low-wage jobs and in nontraditional fields. Today, women are nearly two-thirds of workers in minimum wage jobs, as well as two-thirds of tipped workers, and women of color are 23 percent of minimum wage workers.⁵¹ Many are working full-time and supporting families on these wages. Because women, and in particular women of color and immigrant women, are overrepresented in low-wage jobs, including minimum wage and sub-minimum wage positions, they are especially vulnerable to sexual harassment and discrimination, and retaliation when they try to enforce their rights.

The EEOC observed last year that workplaces where an employee's compensation is tied to customer satisfaction or service are at higher risk for harassment.⁵² This is particularly true in industries such as food service and retail, with high numbers of low-wage jobs, and where workers depend on tips or commissions to supplement their wages. For instance, a 2014 survey of restaurant workers found that 78 percent of women, and 55 percent of men, surveyed reported being sexually harassed by customers.⁵³ And retail workers routinely are subject to sexual harassment by customers, from lewd and sexual comments, stalking, invasive photographs, and unwanted physical contact, to sexual assault.⁵⁴ A recent survey found that 58 percent of hotel workers and 77 percent of casino workers surveyed in Chicago had experienced sexual harassment by guests.⁵⁵ These incidents illustrate how employers often condone or turn a blind eye to customer or client harassment by ignoring complaints and encouraging employees to cater to customers. The Proposed Enforcement Guidance would be

⁵¹ NAT'L WOMEN'S LAW CTR., FAIR PAY FOR WOMEN REQUIRES A FAIR MINIMUM WAGE (May 2015), available at <http://nwlc.org/resources/fair-pay-women-requires-fair-minimum-wage/>.

⁵² EEOC, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 1, 28 (June 2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

⁵³ THE GLASS FLOOR, *supra* note 7, at 13; RESTAURANT OPPORTUNITIES CENTER (ROC) OF BOSTON, BEHIND THE KITCHEN DOOR: THE PROMISE AND DENIAL OF BOSTON'S GROWING RESTAURANT INDUSTRY, available at http://rocunited.org/wp-content/uploads/2016/11/BKD_Boston_Report_W.pdf (35 percent of tipped workers in Greater Boston reported that they have been sexually harassed by customers).

⁵⁴ See *EEOC v. Costco Wholesale Corp.*, Civ. Act. No. 14-cv-6653 (N.D. Ill. Dec. 22, 2016) (jury verdict in favor of employee on hostile work environment sexual harassment claims where employer told employer customer repeatedly subjected her to unwelcome touching and advances, and stalking, and employer failed to take action), <https://www.eeoc.gov/eeoc/newsroom/release/12-22-16.cfm>; *Swiderski v. Urban Outfitters, Inc.*, No.14cv6307 (S.D.N.Y. June 4, 2015) (denying retail employer's motion to dismiss employee's hostile work environment sexual harassment and retaliation claims, where employee alleged employer ignored her complaints that one customer made sexual comments and took photos under her skirt, and another customer physically assaulted her), <http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2014cv06307/430988/18/>; *EEOC v. Fred Meyer Stores, Inc.*, Case 3:11-cv-00832-HA (D. Or., settled 2014) (female employees at grocery store were repeatedly sexually harassed by the same customer for years, daily visiting the store and making lewd comments, cornering and groping employees and pulling an employee into his lap; employee complaints were dismissed by the employer), <https://www.eeoc.gov/eeoc/newsroom/release/5-5-14a.cfm>.

⁵⁵ HANDS OFF, PANTS ON, *supra* note 14, at 4. Only 33 percent of workers surveyed reported the incidents to managers; the most common reasons given for not reporting harassment related to a belief that little can be done to address indecent guest behavior. *Id.* at 8.

With the law on your side, great things are possible.

strengthened by further discussion and examples, illustrating common factual situations involving customer and client harassment in low-wage industries, and the ways in which employers may incur liability for actively discouraging employee complaints, ignoring employee complaints, and failing to take corrective steps to address and prevent the harassment.

B. Employers Can Be Held Liable for Harassment of Teachers By Students.

An increasing number of news reports detail harassment -- particularly sexual harassment -- of school teachers by students.⁵⁶ Teachers have been subject to a barrage of insulting, demeaning, or sexual comments, and in some cases unwanted sexual advances, touching or even assault. While the Supreme Court has recognized that school districts and school boards may be held liable for teacher harassment of students,⁵⁷ as well as student harassment of other students⁵⁸ pursuant to Title IX, teachers harassed by students frequently find their employers insufficiently responsive to their predicament. Accordingly, some teachers have sought to hold their employers liable for hostile work environment harassment pursuant to Title VII, arguing that the schools negligently failed to address harassment by non-employees -- students.

Courts that have considered the issue of student-on-teacher harassment have held that hostile work environment harassment claims may proceed under Title VII.⁵⁹ The Commission should

⁵⁶ Matthias Gafni, "Serra High lawsuit: Catholic school boys competed for up-skirt photos of female teachers," *The Mercury News*, Aug. 12, 2016, <http://www.mercurynews.com/2014/05/15/serra-high-lawsuit-catholic-school-boys-competed-for-up-skirt-photos-of-female-teachers/> (teacher at California Catholic high school the subject of sexually explicit and violent graffiti on the boys' bathroom wall, sexually explicit social media messages, and upskirt photos); DaVonte McKeith, "Police: Teen arrested for sexually harassing teacher," *KETV.com*, Oct. 19, 2015, <http://www.ketv.com/article/police-teen-arrested-for-sexually-harassing-teacher/7655691> (Nebraska high school teacher alleged student inappropriately touched her in the school hallway); Mark Morales, et al., "Brooklyn teacher who says she was sexually tormented by students wins \$450,000 settlement," *N.Y. Daily News*, Sept. 21, 2012, <http://www.nydailynews.com/new-york/education/brooklyn-teacher-sexually-tormented-students-wins-450-000-settlement-article-1.1164205> (Brooklyn high school teacher alleged students made sexual remarks, accused her of receiving a sex act from a student in return for good grades, and that student touched her breast).

⁵⁷ *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274 (1998).

⁵⁸ *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629 (1999).

⁵⁹ *See Berger-Rothberg v. City of New York*, 803 F. Supp. 155, 164 (E.D.N.Y. 2011) (denying employer's motion for summary judgment on special education teacher's Title VII race, gender and religion hostile work environment claims alleging verbal harassment, sexual advances and physical assault by students); *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Ed.*, 491 F. Supp. 2d 467, 478 (D. Del. 2007) (recognizing that "liability for hostile work environment claims under Title VII may attach to schools that fail to address teachers' claim of harassment by students," but granting employer's motion for summary judgment); *Plaza-Torres v. Rey*, 376 F.Supp.2d 171, 182 (D.P.R. 2005) (denying employer's motion for summary judgment on public school teacher's Title VII hostile work environment claim alleging sexual harassment by student); *Peries v. N.Y.C. Bd. of Ed.*, 97-CV-7109 (ARR), 2001 WL 1328921, at *6, 2001 U.S. Dist. LEXIS 23393, at *19 (E.D.N.Y. Aug. 6, 2001) (denying employer's motion for summary judgment on special education teacher's hostile work environment claim alleging national origin and racial verbal harassment by students). Additionally, the Seventh Circuit has addressed the issue tangentially in the context of an Equal Protection claim, explaining that in a Title VII context, a school district could be liable to a teacher if it "knew he was being harassed and failed to take reasonable measures to prevent it." *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002).

With the law on your side, great things are possible.

strengthen the Proposed Enforcement Guidance by explicitly extending Title VII protection to teachers harassed by students, and clarifying the application of the negligence standard to employers through illustrative examples.

VI. The Proposed Enforcement Guidance’s Discussion of the Analysis of the Unwelcomeness of Harassing Conduct Should Be Strengthened.

The Proposed Enforcement Guidance takes the position that while “unwelcomeness” should not be analyzed as part of a prima facie case of hostile work environment harassment,⁶⁰ it should be part of the analysis of whether conduct is subjectively and objectively hostile. We urge the Commission to provide further clarity with regard to the inclusion of an unwelcomeness analysis in the determination of whether the conduct at issue was subjectively and objectively hostile. Such an analysis can present significant barriers for women working in low-wage or nontraditional jobs, who face high rates of sex-based harassment, including sexual harassment,⁶¹ but often delay reporting or do not report harassment for fear of retaliation, or because their employer ignores or discourages complaints.⁶²

The Commission properly acknowledges that a complainant’s own statement that she perceived the conduct at issue as offensive may be enough to establish subjective hostility, and that a delay in complaining about harassment does not mean that the conduct was not subjectively hostile.⁶³ But the Proposed Enforcement Guidance does not provide further discussion or examples of what constitutes an unacceptable period of delay, or an appropriate explanation for the delay in complaining about harassment. Likewise, we believe that employers and workers would benefit from further discussion of the relevance of a worker’s failure or inability to communicate the unwelcomeness of conduct to the determination of whether conduct was objectively hostile. If a farmworker’s supervisor constantly makes sexual comments about her body, asks for dates, or fondles her, she may laugh off such conduct in public because she is afraid of losing her job if she communicates that it is unwelcome, let alone reports the conduct. In such a case, the farmworker would find it difficult to establish that the conduct was unwelcome. Accordingly, further guidance would be particularly helpful in ensuring that harassment protections for vulnerable workers in low-wage or nontraditional jobs are not undermined by courts’ failure to acknowledge the reality of these workplaces.

VII. The Proposed Enforcement Guidance Correctly Recognizes That Conduct That Occurs in a Non-work Related Context May Constitute Harassment.

We commend the recognition in Section III.D.2.c of the Proposed Enforcement Guidance that conduct by supervisors or coworkers that occurs in a non- work context can have impacts in the workplace and constitute harassment, such as the use of private social media accounts, or

⁶⁰ Proposed Enforcement Guidance, §III.C.

⁶¹ See Section I, *supra*.

⁶² Low-wage workers are far less likely to report occurrences of sexual harassment in their workplace due to the very real possibility of retaliation (demotion, loss of hours, etc.), loss of a much needed job, social humiliation, and even physical assault. *Id.*

⁶³ Proposed Enforcement Guidance, §III.C.2.

With the law on your side, great things are possible.

a physical assault. Indeed, for some working women, particularly those in low-wage jobs or working in traditionally male-dominated industries, sex-based harassment may take the form of sexual assault that occurs outside the workplace. We urge the Commission to include additional examples of such conduct in the Final Guidance to clarify that in some circumstances, such as when the harassment is severe and carried out by a supervisor, harassment, even if solely in a non-related work context, can create a hostile work environment because of its impact on an employee in regard to workplace interactions with the harasser.

VIII. The Final Guidance Should Provide Further Clarity Regarding Employee Training.

We believe the Proposed Enforcement Guidance’s discussion in the Promising Practices section of core principles to guide employer efforts to prevent and address harassment effectively could be strengthened in a significant way. Section VI.D suggests that training for managers and supervisors should include “[i]nformation about how to prevent, identify, stop, report and correct harassment,” including “[e]asy-to-understand, realistic methods for addressing harassment that they observe.” While we agree such training is vital to preventing harassment, we believe it should not be limited to managers and supervisors. Coworker/peer intervention is a necessary element for workplace culture change regarding harassment. Coworkers who are peers can be more effective change agents than managers or supervisors, in part because their interventions are not fraught with the same power dynamics and implications for job security. And unlike managers or supervisors, coworkers are often present when harassing conduct occurs, and can take immediate, direct action to stop or deter it. Accordingly, we urge the Commission to include an explicit suggestion that employers implement bystander intervention training for employees to augment harassment prevention efforts.

* * *

Thank you for the opportunity to submit comments on the Proposed Enforcement Guidance. Please do not hesitate to contact Emily J. Martin (emartin@nwlc.org) or Maya Raghu (mraghu@nwlc.org) if we can provide further information.



Emily J. Martin
General Counsel and Vice President for Workplace Justice



Maya Raghu
Senior Counsel and Director of Workplace Equality

With the law on your side, great things are possible.